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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1938.

CERTIORARI GRANTED APRIL 11, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF OHIO.

Lowe Brothers Company, Plaintiff,

vs.

The United States of America, Defendant.

At Law No. 4290.

PETITION—Filed May 24, 1930.

I.

The above named petitioner, Lowe Brothers Company, alleges that it is now, and since June, 1929, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and that it acquired the claim sued on herein in a merger as hereinafter more specifically set forth.

II.

Petitioner alleges that it was incorporated in June 1929, and on the first day of June, 1929, was party to an indenture by and between the Sherwin-Williams Company, which indenture is set forth as Exhibit "A" and made a part of this petition by reference. Petitioner further alleges that the assets which it received under the agreement and covenants of the indenture were transferred to the Sherwin-Williams Company by the Lowe Brothers Company, a corporation organized and incorporated in 1893. Said indenture between the Lowe Brothers Company (incorporated in 1893) and the Sherwin-Williams Company is hereinafter set forth as Exhibit "B" and made a part of this petition by reference.

III.

Petitioner alleges that its predecessor, the Lowe Brothers Company (incorporated in 1893), under the provisions of the Act of Congress, approved October 3,

1917, entitled "An Act to provide revenue to defray war expenses and for other purposes," otherwise generally known as an amendment to the Revenue Act of 1916, duly filed its income and excess profits tax returns for its fiscal year ended September 30, 1917, on October 31, 1917; under the provisions of the Act of Congress, approved February 24, 1919, entitled "An Act to provide revenue and for other purposes," otherwise generally known as the Revenue Act of 1918, filed income and excess profits tax returns for its fiscal year ended September 30, 1918, on October 31, 1918. On January 28, 1924, the Commissioner of Internal Revenue found an alleged deficiency in tax of $31,771.71 against the petitioner's predecessor for its fiscal year ended September 30, 1917, which additional tax was assessed in May, 1924, more than five years after petitioner's said predecessor had filed its 1917 income and profits tax return. The said Commissioner of Internal Revenue found that the said petitioner's predecessor had overpaid its tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Instead of refunding this total amount, the said Commissioner of Internal Revenue erroneously and illegally credited the sum of $11,230.14, representing a part of the overpayment of tax for the fiscal year ended September 30, 1918, against the alleged deficiency tax of $31,771.71 for the fiscal year ended September 30, 1917, and the Collector of Internal Revenue made said credit on April 23, 1924, and the Commissioner of Internal Revenue ratified it on May 10, 1924. Under Section 609 of the Revenue Act of 1928, said credit is wholly void.

IV.

On March 31, 1928, petitioner's predecessor filed a claim for the refund of $40,000.00 for its fiscal year ended September 30, 1917, asserting that said tax was paid after the running of the statute of limitations and on February 1, 1929, the Commissioner of Internal Revenue disallowed said claim for the said $11,230.14 credited as aforesaid.

V.

The claimant avers that it, and its predecessor, is and always has been the sole owner of the claim hereinbefore referred to, and has not assigned or transferred the whole or any part thereof or interest therein; that said corporation and its duly qualified officers have at

all times borne true allegiance to the United States of America, and have not, in any way, voluntarily given encouragement to rebellion against said Government, or aided or abetted in any manner, or given comfort to any sovereign or government that is or ever has been at war with the United States Government.

The defendant, the United States of America, is sued in its sovereign capacity for the reason that Charles M. Dean who was Collector of Internal Revenue for the First District of Ohio in 1924, is no longer in office as Collector, having retired September 15, 1927.

VI.

The Plaintiff further alleges that although the overpayment of $11,230.14 erroneously credited as above alleged, was allowed by the Commissioner of Internal Revenue, no part of said sum of $11,230.14 has been refunded up to the time of bringing this suit, although the Commissioner of Internal Revenue has been repeatedly requested by the plaintiff, and its predecessor, to refund the said sum of $11,230.14, erroneously credited by the Commissioner of Internal Revenue against said additional tax claimed to be due for the fiscal year ended September 30, 1917.

Wherefore, premises considered, the plaintiff aforesaid prays that it have and recover of and from the defendant the sum of $11,230.14, with interest thereon at the rate of six per cent per annum as provided by law.

(Sgd.) John E. Hughes,
(Sgd.) William Cogger,
Counsel for Plaintiff,
844 Earle Building,
Washington, D. C.
(Sgd.) Dolle, O'Donnell & Cash,
Counsel for Plaintiff,
Cincinnati, Ohio.

State of Ohio,)
County of Montgomery.) ss.

Donald A. Kohr, being duly sworn, deposes and says that he is president of the Lowe Brothers Company, the claimant in the above entitled cause; that he has read the above petition and that the matters therein stated are true to the best of his knowledge and belief, except as

to those matters stated to be upon information and belief and those matters he believes to be true.

(Sgd.) Donald A. Kohr.

Subscribed and sworn to before me this 20th day of May, A. D., 1930.

(Sgd.) Carl R. Harlow,
Notary Public.

(Seal)

EXHIBIT "A."

This Indenture Made and entered into on the 1st day of June, 1929 by and between The Sherwin-Williams Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (Hereinafter called the "Grantor") and The Lowe Brothers Company (incorporated June, 1929) a corporation duly organized and existing under and by virtue of the laws of the State of Ohio (hereinafter called the "Grantee").

Witnesseth That:

Whereas, the Grantor has agreed to convey to the Grantee the property hereinafter described, and the Grantee in consideration thereof has agreed to assume the obligations and liabilities hereinafter described:

Now, Therefore, in consideration of the premises and of the agreements and covenants of the Grantee hereinafter contained the Grantor does hereby grant, convey, release, assign, transfer and set over unto the Grantee all of the following described property, to wit:

All the real estate, tangible personal property, accounts receivable, contract rights, choses in action, shares of stock, Goodwill, business, and other property acquired by the Grantor from The Lowe Brothers Company (incorporated 1893) by virtue of an indenture, warranty

deeds and other instruments dated May 31, 1929, entered into by and between the Grantor and said The Lowe Brothers Company, not including however, the United States Bonds and the cash so acquired, but specifically including any and all profits earned by said business and properties on and after June 1, 1929, and in addition thereto, the sum of $430,875.69 in cash.

To Have And To Hold the same unto The Lowe Brothers Company (incorporated June, 1929) the Grantee herein, and its successors and assigns forever.

The Grantor covenants that it will upon reasonable request made by the Grantee execute and deliver such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this instrument.

This Indenture further witnesseth that the Grantee in consideration of the foregoing conveyance, and for itself, its successors and assigns, does hereby covenant and agree to and with the Grantor as follows:

1. That the Grantee will and it does hereby assume and undertake to perform and carry out all of the obligations and liabilities of The Lowe Brothers Company (incorporated 1893) existing on May 31, 1929 and arising thereafter in the operation of the properties and business acquired by the Grantor from said The Lowe Brothers Company (incorporated 1893) as hereinabove stated.

2. That the Grantee will and it does hereby assume and agree to pay, as the same shall become due and payable, or at such other times as the Grantee may elect and agree upon with the holders, all of the indebtedness and liabilities of said The Lowe Brothers Company (incorporated 1893) existing on May 31, 1929 and arising thereafter in the operation of said properties and business.

3. That the Grantee shall and will indemnify, protect, defend and save the Grantor free and harmless from any and all liabilities, loss, costs or expense in any way connected with, growing out of, or resulting from any of the liabilities, contracts, obligations and engagements so assumed by the Grantee as above provided.

In Witness Whereof, the Grantor has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary pursuant to authority of its Board of Directors, and

Exhibit A

the Grantee has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary pursuant to authority of its Board of Directors, all in duplicate, as of the day and year first above written.

The Sherwin-Williams Company,
By Geo. A. Martin,
President.

Attest:
H. J. Douglas,
Secretary.

The Lowe Brothers Company,
(Incorporated June 1929)
By Donald A. Kohr,
President,

Attest:
Charles W. Parrott,
Secretary.

Signed, Sealed and Acknowledged
and Delivered in the presence of:
R. A. Bradley,
C. J. Rossow,
David P. Haber,
Milton Wright.

State of Ohio, }
County of Cuyahoga } ss.

On this 8th day of July 1929, before me, A Notary Public in and for said County and State, personally appeared G. A. Martin and H. J. Douglass to me personally known and known to me to be respectively the President and Secretary of The Sherwin-Williams Company, the corporation described in and whose name is signed to the foregoing indenture who acknowledged that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal the foregoing indenture in the name and on behalf of said corporation by authority of its Board of Directors duly and legally given, and that said indenture is the free act and deed of said The Sherwin-Williams Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my name and official seal at the City of Cleveland, Ohio, the day and year in this certificate above set forth.

L. H. Schroeder,
Notary Public.

Exhibit A

State of Ohio,)
County of Montgomery) ss.

On this 8th day of July 1929, before me, a Notary Public in and for said County and State, personally appeared Donald A. Kohr and Charles W. Parrott to me personally known and known to me to be respectively the President and Secretary of The Lowe Brothers Company, the corporation described in and whose name is signed to the foregoing indenture who acknowledge that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal the foregoing indenture in the name and on behalf of said corporation by authority of its Board of Directors duly and legally given, and that said indenture is the free act and deed of said The Lowe Brothers Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my name and official seal at the City of Dayton, Ohio, the day and year in this certificate above set forth.

David P. Haber,
Notary Public.

EXHIBIT "B."

This Indenture, made and entered into the 31st day of May, 1929, by and between The Lowe Brothers Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (hereinafter called the "Grantor"), and The Sherwin-Williams Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, (hereinafter called the "Grantee"),

Exhibit B

Witnesseth That:

Whereas, the parties have agreed to merge by the transfer and conveyance to the Grantee of all the property and assets of the Grantor:

Now, Therefore, in consideration of the premises and of the sum of Nine Hundred Thousand Dollars ($900,000.00) in cash, and 36,760 shares of the Preferred Stock of the Grantee, entitled to cumulative dividends at the rate of six (6) per cent, per annum, payable quarterly, and 40,634 shares of the Common stock of the grantee, and of the agreements of the Grantee hereinafter contained, the Grantor does hereby grant, convey, release, assign, transfer and set over unto the Grantee all of the following described property, to wit:

> All of the property, real, personal and mixed, tangible and intangible, of every kind and character whatsoever, and wheresoever situate of the Grantor; subject, however, to all of the outstanding liabilities and obligations of the Grantor.

To Have And To Hold the same unto said The Sherwin-Williams Company, the Grantee herein, and its successors and assigns forever.

The Grantor covenants that it will, upon reasonable request made by the Grantee, execute and deliver such further instruments and do such further acts as may be necessary or proper to carry out more effectually the purposes of this instrument.

This Indenture further witnesseth that the Grantee, as a part of the consideration for the foregoing conveyance, and for itself, its successors and assigns, does hereby covenant and agree to and with the Grantor as follows:

> 1. That the Grantee will and it does hereby assume and agree to pay, as the same shall become due and payable, or at such other time as the Grantee may elect and agree upon with the holders, all of the indebtedness and liabilities of the Grantor of every kind and nature.
>
> 2. That the Grantee will and it does hereby assume and agree to perform and carry out all existing unfulfilled contracts, obligations and engagements of the Grantor in all respects in accordance with the terms and requirements thereof, and as though the Grantor itself had continued in the ownership and operation of its property and business.

Exhibit B

3. That the Grantee shall and will indemnify, protect, defend and save the Grantor free and harmless from any and all liability, loss, cost or expense in any way connected with, growing out of or resulting from any of the indebtedness, liabilities, contracts, obligations and engagements of the Grantor so assumed by the Grantee as above provided.

In Witness Whereof, the Grantor has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary, pursuant to authority of its stockholders and Board of Directors, and the Grantee has caused these presents to be executed in its name by its President and its corporate seal to be attached, attested by its Secretary, pursuant to authority of its Board of Directors, all in duplicate on the day and year first above written.

The Lowe Brothers Company,
By (Signed) Donald A. Kohr,
President.
Attest: (sgd) Charles W. Parrott,
Secretary.
The Sherwin-Williams Company,
By (sgd) Geo. A. Martin,
President.
Attest: (sgd) H. J. Douglas,
Secretary.

Signed, Sealed and Acknowledged
and Delivered in the presence of:
(signed) Joseph L. Lockner,
(signed) George B. Young,
(signed) Thomas F. Patton,
(signed) George B. Young.

State of Ohio }
County of Montgomery } ss.

On this 31st day of May, 1929, before me, a Notary Public in and for said County and State, personally appeared Donald A. Kohr and Charles W. Parrott, to me personally known, and known to me to be respectively the President and Secretary of The Lowe Brothers Company, the corporation described in and whose name is signed to the foregoing indenture, who acknowledged that the seal affixed to the foregoing indenture is the corporate seal of said corporation; that they did sign and seal said indenture in the name and on behalf of said corporation, by authority of its stockholders and Board

of Directors, duly and legally given, and that said indenture is the free act and deed of said The Lowe Brothers Company, and of themselves individually and as said respective officers.

In Testimony Whereof, I have hereunto set my hand and official seal at the City of Dayton, Ohio, the day and year in this certificate above set forth.

(Signed) R. P. Davies,
Notary Public.

My commission expires Sept. 15, 1931.

AFFIDAVIT—Filed May 29, 1930.

James B. O'Donnell, being duly sworn on oath, deposes and says that he served a copy of the Petition in the above and foregoing case on the Attorney General of the United States by mailing a copy thereof this day, May 24, 1930, by registered mail, as follows:

"Attorney General of the United States,
Washington, D. C."

James B. O'Donnell.

Subscribed and sworn to before me this 24th day of May, A. D. 1930.

John R. Hahn,
Notary Public in and for Hamilton
County, Ohio.

(Seal)

ANSWER—Filed Aug. 21, 1930.

Now comes the defendant, the United States of America, by Haveth E. Mau, United States Attorney for the Southern District of Ohio, and by way of answer to the matters and things alleged in the petition filed in this cause, says:

I.

That the allegations of first section of the petition are admitted.

II.

That the allegations of second section of the petition are admitted.

III.

That answering the matters and things alleged in the third section of the petition, it is admitted that the Lowe Brothers Company (incorporated in 1893) duly filed its income and excess profits tax return for the fiscal year ending September 30, 1917, on October 31, 1917; and that the said corporation filed its income and excess profits tax return for the fiscal year ending September 30, 1918, on October 31, 1918. It is further admitted that on January 28, 1924, the Commissioner of Internal Revenue found an alleged deficiency in tax to the amount of $31,771.71 against the said petitioner's predecessor as aforesaid, for the fiscal year ending September 30, 1917, but denies that said additional tax was assessed in May, 1924, alleging instead that said assessment was made in March, 1924. It is also admitted that the Commissioner of Internal Revenue found that the said petitioner's predecessor had overpaid its tax for the fiscal year ending September 30, 1918 to the amount of $52,710.13, and that $11,230.14 of the said overpayment was credited against the deficiency tax of $31,771.71 for the said fiscal year ending September 30, 1917, but denies that said credit was made on April 23, 1924, alleging that said credit was made March 15, 1924. By way of further answer and explanation, the defendant says that while admitting the said Lowe Brothers Company (incorporated in 1893) did file its income and excess profits tax return for the period ending September 30, 1917, on October 31, 1917, the defendant alleges that the same was inaccurate, incorrect and false in that it did not disclose the true profits and income of said corporation nor show its true tax liability as required by law; whereupon, it became necessary for the Commissioner of Internal Revenue to investigate the

books and affiairs of said corporation in order to arrive at the true facts, and that as a result thereof said deficiency tax was assessed as aforesaid to the amount of $31,771.71. All other matters and things not specifically admitted in said section are denied.

IV.

That answering the matters and things set out in Section four of the petition, defendant admits that petitioner's predecessor filed a claim for refund as alleged; and that the Commissioner of Internal Revenue disallowed said claim for the sum of $11,230.14 credited as aforesaid on said deficiency tax assessed for the period ending September 30, 1917; and in explanation thereof defendant says that said taxpayer having filed its income and excess profits tax return on October 31, 1917 for the period ending September 30, 1917, ordinarily it is true that the statutory period for assessment and collection would have expired within five years from the date of said return; but defendant alleges that the said taxpayer, petitioner's predecessor, executed and filed on the 25th of January, 1923, through its properly accredited officials, a tax waiver also signed by D. H. Blair, Commissioner of Internal Revenue, in words and form as follows:

Jan. 25, 1923.

'INCOME AND PROFIT TAX WAIVER.'

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 ———— of Ohio and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said Corporation for the fiscal years 1917—under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, irrespective of any period of limitations.

(s) The Lowe Bros. Co.,
Taxpayer.
By (s) F. B. Currigan,
Treasurer.
(s) D. H. Blair,
Commissioner. CMJ."

Answer

That thereafter on February 9, 1923 petitioner's predecessor through its properly accredited officials executed and filed a tax waiver duly signed by D. H. Blair, Commissioner of Internal Revenue, in words and form as follows:

"February 9, 1923.
(Date)

INCOME AND PROFIT TAX WAIVER.

"In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 The Lowe Bros. Co. of Dayton, Ohio, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said The Lowe Brothers Co. for the years 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,'' approved August 5, 1909, irrespective of any period of limitations.

(s) The Lowe Bros. Co.,
Taxpayer.
By (s) F. B. Currigan,
Treasurer.
Approved Feb. 20, 1923.
(s) D. H. Blair,
Commissioner of Internal Revenue."

That said tax waivers extended the statutory period to such extent that said assessment and application of payment thereon was made within due time and within the period allowed by law; and that the Commissioner of Internal Revenue in rejecting said claim for refund was within his rights and acting in accordance with law. All said matters above set forth are hereby pleaded as matters of defense to this action.

V.

That the allegations of fifth section of the petition are admitted.

Answer

VI.

That answering the matters and things set out in the sixth section of the petition, the defendant denies that the overpayment of $11,230.14 was erroneously credited as alleged and admits that no part of said sum has been refunded. It is also admitted that the claim for refund was rejected by the Commissioner of Internal Revenue being justified therein by reason of the things set out and explained in Section Four of this answer.

Wherefore, defendant prays that the petitioner recover nothing by reason of this action; that the action be dismissed; and that the defendant go without day and recover of the petitioner its costs.

Haveth E. Mau,
United States Attorney, S. D. O.,
Attorney for the defendant.

State of Ohio }
Hamilton County } ss.

Frank Hier, being duly sworn deposes and says that he is the duly appointed, qualified, and acting Assistant United States Attorney for the Southern District of Ohio, and as such is attorney for defendant in this action; that he is authorized to make and does make affidavit on behalf of defendant; that he has read the foregoing Answer and of his own knowledge knows the same to be true, except as to matters and things stated on information and belief, and as to these he believes it to be true.

Frank Hier,
Assistant U. S. Attorney.

Sworn to before me and subscribed in my presence this 20 day of August, A. D. 1930.

James P. Unger,
Notary Public, in and for Hamilton County, Ohio.

(Seal)

REPLY—Filed Jan. 30, 1933.

Comes again the petitioner and in reply to the answer of the defendant, says:

III.

Replying to new matters and things alleged in Section 3 of the Answer, petitioner denies that the credit referred to in this section was made March 15, 1924 and denies all other allegations therein contained, except those specifically admitted or alleged in the petition or in this reply.

IV.

Replying to new matters and things alleged in Section 4 of the answer, petitioner admits that the statutory period for assessment and collection expired within five years from the date of the return of the petitioner made in October 1917; and while admitting the execution of the waivers set out in said Section 4, denies the statement that said waivers extended said statutory period to such an extent that said assessment and application of payment thereon was made within due time and within the period allowed by law, and denies the further statement that the Commissioner of Internal Revenue in rejecting petitioner's claim for refund was within his rights and acting in accordance with law.

VI.

Replying to new matter and things alleged in Section 6 of the answer, petitioner denies that the Commissioner of Internal Revenue was justified in the rejection of petitioner's claim for refund.

Wherefore, petitioner prays as it did in its petition.

Dolle, O'Donnell and Cash,
Counsel for Plaintiff,
Cincinnati, Ohio.

State of Ohio }
County of Hamilton } ss.

James B. O'Donnell, being duly sworn, deposes and says that he is one of the attorneys for the petitioner in this cause; that he is authorized to make and does make affidavit on behalf of petitioner; that he has read the above reply and that the matters stated therein are true to the best of his knowledge and belief, except as to

matters stated to be upon information and belief and those he believes to be true.

James B. O'Donnell.

Subscribed and sworn to before me this 30th day of January, 1933.

Alberta Wood,
Notary Public in and for Hamilton County, Ohio.

(Seal)

STIPULATION WAIVING A JURY—Filed Sept. 15, 1932.

It is hereby agreed between the parties by the respective counsel that this case be tried by the Court without the intervention of a jury.

(Signed) Nevin,
Judge, U. S. District Court, S. D. O.

Approved—
James B. O'Donnell,
John E. Hughes,
Counsel for Plaintiff.
Haveth E. Mau,
Counsel for Defendant.

STIPULATION OF FACTS—Filed Jan. 30, 1933.

It is hereby stipulated between the parties, both plaintiff and defendant, by their respective attorneys of record, that the following facts shall be taken as true for the purposes of the trial of the case, and the court is requested to make its findings of fact in accordance therewith, it being understood and agreed that either party may introduce further and additional evidence in reference to the matters herein stipulated, but not in contradiction thereof.

I.

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

II.

2. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

III.

3. On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

IV.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit by signing

Schedule IT R 9664 on May 10, 1924. (Certified photostate copies of the Schedule of Overassessments, No. IT A 9664, and of the Schedule of Refunds and Credits, No. IT R 9664, are hereby made a part of this stipulation as Exhibit A.)

V.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. (a photostat copy of which is hereto attached, made a part of this stipulation, and marked Exhibit B.) On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of said claim.

VI.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. (Photostat copies of these waivers are attached hereto, made a part of this stipulation, and marked Exhibits C and D respectively.)

John E. Hughes,
Attorney for Petitioner.
Haveth E. Mau,
Attorney for Defendant.

By agreement of Counsel, the letter of Jan. 29, 1929, hereto attached marked Exhibit A2 is to be considered as part of the Stipulation above.

James B. O'Donnell,
Atty. for Pltff.
W. F. Evans,
For Defendt.

Jan. 30, 1933.

EXHIBIT A.

UNITED STATES (EMBLEM) OF AMERICA

General Accounting Office.

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered P-1 and P-2, are true copies of the official documents now on file in the General Accounting Office in the following case:

Lowe Brothers Company v. United States.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 13th day of November, in the year 1930, at Washington.

J. Lee Carr,
Comptroller General of the United States.

Exhibit A

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 7805
Form approved by Comptroller General
Feb. 5, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

SCHEDULE OF OVERASSESSMENTS

AND

Allowance of Abatements, Credits, Refunds, and Related Claims, If Any

INCOME TAX UNIT

ORIGINAL
Voucher to General Accounting Office
FIRST *District of* OHIO
(Stamp)
RECEIVED
Mar 24 1924
Collector Internal Rev.
First Dist. Ohio

C-16509

Schedule No. IT-A-9664

Sheet 1 of.....sheets

AUTHORIZATION OF COMMISSIONER

To the Collector FIRST District of OHIO

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Refund" attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the conditions of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date MAR 15 1924

D. H. Blair,
Commissioner of Internal Revenue.

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The returns of the taxpayers listed herein, together with their claims (if any) and appropriate supporting evidence, have been carefully examined and the tax liability of the respective taxpayers has been determined in accordance with the available facts and the law. The overassessments or reductions in tax liability appearing in column 4 are accordingly recommended for allowance.

Date MAR 15 1924

J. G. Bright,
Deputy Commissioner.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date 4/24/24

Collector 1st District of Ohio

Chas. M. (illegible)

ACCOUNTS UNIT

Noted and entered

Initials	Date
T	5/29/24

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Overassessments or Reductions of Tax Liability (Amount) (4)	List, Page and Line, or Account Number (5)	Taxable Year. (6)	(Entries to be made by the Collector) Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to (Form 7805-A) (9)	Account Credited; List, Page and Line (10)	Due Date of Items Against Which Credit Was Made (11)	Net Amount Refundable Carried to Form 7805-A (12)	Remarks (13)
3	72711	Lowe Brothers Co.	52710.03		9/30/18	32448.98	20261.05	(8000.00	12/400503-12/21 L			Yr. 9/30/21
								(149.98	5/400502-5/22 L 5/10/22			Yr. 368 M
								(880.93	3/02–3/24 Sp. #10CL 4/27/24 yr. 9/30/16			Addtl. assess.
								(11230.14	3/02–3/24 Sp. #10CL 4/27/24 yr.9/30/17			will follow

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 7805-A
Form approved by Comptroller General
Feb. 5, 1923

IMMEDIATE
This schedule must be executed and all required steps taken without delay.
Commissioner of Internal Revenue.

SCHEDULE OF REFUNDS AND CREDITS

ORIGINAL
Voucher to General Accounting Office

Illegal Or Erroneous Collections
INCOME TAX UNIT

Schedule No. IT-R-9664
Sheet 1 of 1 *Sheets.*
1st *Dist. of* OHIO
D. C. Voucher No......

22865

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date 4/24/24

Chas. M. (illegible)
Collector, 1st District of Ohio

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.

Date MAY 10 1924

J. G. Bright
Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date MAY 10 1924

C. R. Nash
Acting Commissioner of Internal Revenue

Unit	Notations	Date
A & C	Cl	5/19/24

Item No.	Certificate of Overassessment or Claim Number	Name and Address of Taxpayer	Net Amount Refundable	Amount Credited	(Not to be used by Collector) Interest Accrued	(Not to be used by Collector) Total Refundable	Date of Final Payments of Accounts from which Credits were Transferred and Overpayments Found	(Not to be used by Collector) Refunding Taxes Illegally Collected: 1924 and Prior Years	19....	19....	Paid by Disbursing Clerk, Treas. Dept., by Checks Dated May 23 1924 Numbered as follows:	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
3	72711	LOWE BROTHERS CO., The		(880.93 (11230.14			12/6/19					

EXHIBIT A-2.

UNITED STATES (EMBLEM) OF AMERICA

Treasury Department

Washington

July 7, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated January (ineligible), 1929, to Lowe Brothers Company, Dayton, Ohio, from C. B. Allen, Deputy Commissioner on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld,

(Seal) Chief Clerk, Treasury Department.

Jan. 29, 1929.

IT:C
WAM
Lowe Brothers Company,
Dayton, Ohio.

Sirs:

Reference is made to your claim for refund of $11,230.14, Federal income and profits taxes for the fiscal year ended September 30, 1918.

The claim is based upon the statement that an overpayment of tax for the taxable year was credited to an outlawed outstanding tax for the fiscal year ended September 30, 1917 and the statutory period of limitations had run on the collection and crediting of this tax.

An examination of the case discloses that your return for 1917 was filed on October 31, 1917. The unlimited waivers on the assessment and collection filed on January 25, 1923 and February 9, 1923 extended the statutory period for collection to April 1, 1924. The credit of $11,230.14, representing an overpayment of tax for the fiscal year ended September 30, 1918, was applied against the additional tax of $31,771.77 assessed on the March 1924 List, which was signed by the Commissioner on March 15, 1924. Inasmuch as credit was applied within the statutory period for collecting the tax, such credit is valid.

Exhibit A-2

In view of the foregoing, your claim will be rejected in full.

Your claim for refund of $40,000.00 covering the fiscal years ended September 30, 1917 and September 30, 1918 will also be rejected for the portion pertaining to the fiscal year ended September 30, 1918 for the reasons stated above.

The rejections will officially appear on the next schedule to be approved by the Commissioner.

Respectfully,
C. B. Allen,
Deputy Commissioner.
By (Signed) Charles P. Soman,
Head of Division.

SDG-2
(Stamp)
Rejected
13911
I. T. Schedule

PLAINTIFF'S EXHIBIT A-3.

UNITED STATES (EMBLEM) OF AMERICA

Treasury Department
Washington

July 7, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of (ineligible), income tax for the period from October 1, 1916, to September 30, (ineligible) with Exhibit A attached), filed by Lowe Brothers Company, Dayton, Ohio on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. Birgfeld,
Chief Clerk, Treasury Department.

Plaintiff's Exhibit A-3

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
(Stamp)
RECEIVED
May 23 1928
CLAIMS CONTROL SECTION
Stamp here

COLLECTOR'S NOTATION
District
1st Ohio
Account number
Mch-01-#10
Mch 02-#10-1924 Cl
Date received
(Stamp)
RECEIVED
Collector of Internal Revenue
for District of Ohio
May 15 1928
CINCINNATI OFFICE
Stamp here
Collector of Internal Revenue

State of Ohio
County of Montgomery } *ss:*

2049772

TYPE OR PRINT

Lowe Bros Company
(Name of taxpayer or purchaser of stamps.)

(Residence—give street and number as well as city or town and State.)

Dayton Ohio
(Business address.)

1 Ohio
Fisc 9-30-1917-18

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From: Oct. 1,	1916
To: Sept. 30,	1918

1. Business in which engaged.....
2. Character of assessment or tax.....
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax Liability requested (Income and Profits Tax)..... $ 40,000.00
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)..... $ 40,000.00
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) May 2, 1924
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed.....
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit..... $.....
11. Unpaid assessment against which credit is asked; period from . . ..to..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

For the reasons set forth on the paper affixed hereto and made by specific reference a part of this Claim and marked Exhibit "A."

Rej 13911

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 7 day of May, 1928.
David P. Haber
Notary Public.
(Title.)

(Seal)

Signed:
Lowe Brothers Company
By *Frank B. Currigan*
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

CERTIFICATES

Schedule No. .....

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
.....	.....	.....	.....	.....	.....	.....	$.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

.....
Collector of Internal Revenue.

.....
Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state:	
						Serial number.	Period commencing
.....		.....	.....	.....	$.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....
.....		.....	.....	.....	.....	.....	.....

.....
Collector.....District.....

Claim No. .....

Schedule No. .....

(Stamp)
REJECTED
13911
I T SCHEDULE

Adjusted under
cert #2042677

Schedule No. ..... District.....

Allowed or Rejected Number..... .....
(Nature of tax.)

Claimant..... . . ..

Address . . ..

Examined and submitted for action....., 19....

Claim examined by—
.....
Claim approved by—
.....
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed.. $..... .....

Amount allowed.. $..... .....

Amount rejected.. $(illegible) .....

EXHIBIT "A."

Reference is made to the deficiency for the fiscal year ended September 30, 1917, in the amount of $31,771.77 as assessed against the above named taxpayer in March, 1924. Reference is also made to the allowance of $52,710.03 allowed as an overpayment for the fiscal year ended September 30, 1918. This allowance as shown on schedule No. 9664 was partly credited in the amount of $11,230.14 against the deficiency assessed for the year ended September 30, 1917, as heretofore mentioned. The balance of the deficiency for 1917 in the amount of $20,541.63, was paid by the petitioner May 2, 1924. The balance of the deficiency, to wit, $11,230.14, as previously stated was allowed as a credit to the 1918 allowance as shown on schedule No. 9664. It is believed that this allowance was credited subsequent to April 1, 1924, and prior to June 2, 1924.

It is respectfully submitted on behalf of the above mentioned taxpayer, that at the time $11,230.14 of the overpayment for 1918 was credited against a portion of the deficiency for 1917, that the statute of limitations had run against the collection of this deficiency. It is also submitted that at the time of the payment of the balance of the deficiency in the amount of $20,541.63, this payment being made May 2, 1924, the statute of limitations as to the collection of this deficiency had run against the Government.

In conclusion we respectfully request that a portion of the 1918 overpayment in the amount of $11,230.14 be refunded to the taxpayer, and that the amount of $20,541.63 as paid on May 2, 1924, be likewise refunded to the taxpayer.

In brief, it is contended by the taxpayer that at the time the deficiency for 1917 was paid either by credit or by cash, the statute of limitations as set forth in Section 250 of the Revenue Act of 1921 had run against the collection of the deficiency.

The taxpayer also contends that its income was overstated and its invested capital understated, by reason of which there was assessed and collected against it an excessive and illegal tax.

Exhibit B

EXHIBIT "B."

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
Internal Revenue Service
Form 64$—Jan., 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED

☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS

☒ REFUND OF TAXES ILLEGALLY COLLECTED

☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

COLLECTOR'S NOTATION
District 1st Ohio
Account number Mch 02-Spl 10-1924 CL
Date received (Stamp) RECEIVED Collector of Internal Revenue for District of Ohio Apr 2 1928 CINCINNATI OFFICE Stamp here
Collector of Internal Revenue

Date received by Administrative Unit (Stamp) RECEIVED Apr 5 1928 CLAIMS CONTROL SECTION Stamp here

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Ohio
County of Montgomery } *ss:*

2042677

TYPE OR PRINT

Lowe Bros Company
(Name of taxpayer or purchaser of stamps.)

.....
(Residence—give street and number as well as city or town and State.)

Dayton Ohio
(Business address.)

Fisc 9-30-1917
1 Ohio

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period		Year
From: October	1	1916
To. September	30	1917

1. Business in which engaged.....
2. Character of assessment or tax.....
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..... $.....
4. Reduction of Tax Liability requested (Income and Profits Tax)..... $ 40,000.00
5. Amount to be abated..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable)..... $ 40,000.00
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) May 2, 1924
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed.....
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit..... $.....
11. Unpaid assessment against which credit is asked; period from .....to..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

That the above amount of tax was paid after the running of the statute of limitations and the Collector of Internal Revenue had no authority to demand payment of the tax.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 31 day of March, 1928
David P. Haber
Notary Public.
(Title.)

(Seal)

Signed:
Lowe Brothers Company
By *Frank B. Currigan*
Treasurer.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

CERTIFICATES

Schedule No. .....

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer.	Character of assessment and period covered.	List.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
							$		

.....
Collector of Internal Revenue.

.....
Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state:	
						Serial number.	Period commencing
					$		

Claim No. .....

.....
Collector.....District.....

Schedule No. .....

Adjusted under
cert #2042677

Schedule No. ..... District.....

Allowed or Rejected Number.....

.....
(Nature of tax.)

Claimant.....

Address .....

Examined and submitted for action....., 19....

Claim examined by—
.....
Claim approved by—
.....
Chief of Division.

COMMITTEE ON CLAIMS

Amount claimed.. $..... .....

Amount allowed.. $..... .....

Amount rejected.. $..... .....

EXHIBIT "C."

20751894
Jan. 25, 1923.
Date

INCOME AND PROFIT TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921.....of Ohio and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said Corporation for the fiscal year 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

The Lowe Bros. Co.
Taxpayer.
By F. B. Carrigan,
Treasurer.

D. H. Blair,
Commissioner.
C. M. J.

(Seal)
Abstract for 1915 outstanding.
Stamp for Ohio.

EXHIBIT "D."

Distribution Center
Feb. 13, 1923
Con. Ret. Subdivision.
February 9, 1923.
Date

INCOME AND PROFIT TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 The Lowe Bros. Co. of Dayton, Ohio, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profit, or war profits taxes due under and return made by or on behalf of the said The Lowe Brothers Co. for the years 1917 under the Revenue Act of 1921, or under prior income, excess-profit, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

The Lowe Bros. Co., (Seal)
Taxpayer,
By F. B. Currigan,
Treasurer.

Approved Feb. 20, 1923.
Date

Commissioner.

D. H. Blair,
A
Commissioner of Internal
Revenue.

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Feb. 15, 1933.

FINDINGS OF FACT.

The defendant respectfully requests the Court to find the facts in this case as follows:

The parties having by stipulation agreed upon the facts, the court is requested to find the facts as stipulated to be true.

CONCLUSIONS OF LAW.

Upon the facts as stipulated and to be found by the court, the defendant respectfully requests the court to make conclusions of law thereon as follows:

1. That the application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for said year 1917 under the provisions of Section 607 of the Revenue Act of 1928, by reason of the restrictive features of Section 609 of said Act.

2. That plaintiff cannot recover in this action under an account stated theory for the reason that the court has not jurisdiction to render judgment in the same.

3. That the plaintiff is not entitled to recover anything by this action.

Frank Hier,
Asst. United States Attorney.

MOTION FOR JUDGMENT—Filed February 15, 1933.

At the close of the testimony, the facts having been stipulated by agreement of the parties, the defendant moves for judgment for that the plaintiff has not produced facts establishing a wrongful or unlawful collection of the tax in suit under the provisions of Section 607 of the Revenue Act of 1928 as alleged, nor has the plaintiff under the facts as stipulated shown grounds for recovery either in law or fact, by which the court can proceed to judgment.

Frank Hier,
Asst. United States Attorney.

DECISION—Filed April 11, 1934.

Nevin, District Judge:

On May 24, 1930, plaintiff herein filed its petition wherein it prays for judgment against the defendant, The United States of America, in the sum of $11,230.14 with interest. Plaintiff alleges this sum to be due it because of an attempted application of a portion of an overassessment allowance to the extent of the sum mentioned from its 1918 tax to a barred deficiency for the year 1917. Some question having been raised as to the nature of plaintiff's action, it was indicated in open court at the time of trial that plaintiff relied upon the petition as setting out a case for refund of overpayment of tax for the period ended September 30, 1917. The case was tried to the court, trial by jury having been waived in writing. Substantially all of the facts were agreed to and are set forth in a stipulation signed by counsel for the respective parties and filed in this court on January 30, 1933.

Briefly, as disclosed by the stipulation, the facts are as follows: Lowe Brothers Company is a corporation

organized and existing under the laws of Ohio. It was incorporated in June, 1929. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, and paid the tax shown due thereon. It filed its income and excess profits tax for the fiscal year ended September 30, 1918, on October 31, 1918, and paid the tax shown due thereon. On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of over-assessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of this latter amount, the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied this credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924. On April 2, 1928, Lowe Brothers Company (incorporated in 1893) filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of rejection of this claim. On January 25, 1923, and on February 9, 1923, respectively, Lowe Brothers Company (incorporated in 1893) filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917.

At the conclusion of the presentation of all of the evidence, defendant moved the court for judgment in its behalf upon the grounds that the plaintiff had not produced facts establishing a wrongful or unlawful collection of the tax in suit under the provisions of Section 607 of the Revenue Act of 1928, as alleged, nor, under the facts as stipulated, had plaintiff shown grounds for recovery.

It is claimed upon the part of the defendant that inasmuch as it is conceded that plaintiff's action is based upon a claim for overpayment of the 1917 tax under Section 607 of the Revenue Act of 1928, plaintiff cannot maintain its action or recover judgment because of the provisions of Section 609 of the same Act.

Section 607 provides as follows:

"Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitations properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609 reads in part as follows:

"Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

The Government contends that under Section 607 the **payment** of a barred tax is considered an overpayment of the tax, giving to the taxpayer the same rights as if no tax for the period involved had ever been due, but that Section 609 is a qualification of Section 607 by providing that **credits** from other taxable years in the nature of over-assessments attempted against a barred tax are a nullity and do not give rise to the rights which would accrue had the settlement of the barred tax been made by actual payment.

This question seems to have been considered and decided in the case of Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868 (certiorari denied 287 U. S. 634) wherein the facts are very similar to those in the instant case.

In their brief, counsel for plaintiff contend that the decision in this case is in conflict with the decision of the Supreme Court of the United States in the case of Graham v. Goodcell, 282 U. S. 409, and they say "There is neither logic nor reason in the rule laid down in Parks & Woolson Machine Co. v. U. S., supra; the decision is inconsistent with Boston Press Metal Co. v. U. S., supra, a prior decision in the same court and affirmed with opinion in the Supreme Court, 282 U. S. 409." Counsel for plaintiff asserts (referring to the Parks & Woolson Machine Company case) that denial of an application for certiorari is not equivalent to an affirmance. This statement unquestionably is correct. Hamilton etc. Co. v. Wolf Bros., 240 U. S. 251. However, the decision by the Supreme Court in these cases (the cases of Boston Press Metal Co. v. U. S. and Graham v. Goodcell are both reported in 282 U. S. 409) was rendered on January 26,

1931, whereas the decision in the Parks case, supra, was not rendered by the Court of Claims until May 31, 1932, and certiorari not denied until October 17, 1932. It would seem, therefore, as claimed by counsel for the Government, that the last expression upon this subject is that contained in the Parks & Woolson Machine Company case, supra, and that the Supreme Court denied certiorari in that case with full knowledge of its views as expressed in the cases reported in the 282 U. S. 409.

From a consideration of the evidence as submitted and the law as applicable thereto, as the Court views it, the Court has arrived at the following:

FINDINGS OF FACT.

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

2. Lowe Brothers Company (incorporated in 1893) predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits tax return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

3. On March 15, 1924, the Commissioner of Internal Revenue duly assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917, amounting to $31,771.71.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918 in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instructions from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit on May 10, 1924.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commis-

sioner of Internal Revenue gave formal notice of rejection of said claim.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917.

CONCLUSIONS OF LAW.

1. The application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for said yea 1917 under the provisions of Section 607 of the Revenue Act of 1928, by reason of the restrictive features of Section 609 of said Act.

2. Defendant's motion for judgment in its behalf made at the close of all of the testimony is well taken and it should be and it is sustained.

An order may be drawn dismissing plaintiff's petition, defendant to recover its costs expended herein.

(Signed) Nevin, J.

Appearances:

For Plaintiff: John E. Hughes,
William Cogger,
Washington, D. C.
Dolle, O'Donnell & Cash,
Cincinnati, Ohio.

For Defendant: Francis C. Canny, U. S. Attorney,
Frederic Johnson, Asst. U. S. Attorney,
Habeth E. Mau, Former U. S. Attorney,
Frank Hier, Former Asst. U. S. Attorney,
C. M. Charest, General Counsel,
Bureau of Internal Revenue,
W. F. Evans, Special Attorney,
Bureau of Internal Revenue.

APPLICATION FOR REHEARING—Filed April 27, 1934.

Now comes the plaintiff and moves the court for an order granting a rehearing for the following reasons:

1. That the decision is contrary to the law laid down by our Court of Appeals in Routzahn vs. Reeves Bros. Co., 59 Fed. 2d. 915.

2. That the decision is contrary to Reeves Bros Co. vs. United States of America, C. C. H. Vol. 3—1933, Sec. 9585, decided after this cause had been argued and briefed.

Rehearing denied—application herein overruled.

An order may be drawn dismissing Plfts' petition in accordance with the decision this Court rendered and filed herein on April 10, 1934.

(Signed) Nevin, J. 7/19/34

ARGUMENT IN SUPPORT OF APPLICATION.

In Reeves Bros. Co. vs. United States of America, C. C. H. Vol. 3—1933, Sec. 9585, decided November 23, 1933, after this case was argued and briefed, Judge West said,

> "West, J.: The sole defense presented by the government in its brief is thus stated: 'Congress voided the credits to the deficiencies in question,' citing Sec. 609, Revenue Act of 1928 and Parks & Woolson Mach. Co. v. U. S., 58 F. (2d) 889. In the cited case the Court of Claims sustained the government's claim 'that there was no collection of the 1917 deficiency, either by cash or credit, for the reason that the credit, by which the Commissioner attempted to collect the 1917 deficiency, was void under section 609 of the Revenue Act of 1928.'
>
> The Reeves Bros. case was originally commenced against the collector, and among other defenses was the one now relied on. On appeal our Circuit Court of Appeals held that the Collector was not liable; but said further:
>
> No doubt the procedure amounted to a "payment" of the 1917 taxes because upon the authority of the Commissioner's certificate the Treasury retained the overpayments in satisfaction of 1917 taxes .(Graham & Foster vs. Goodcell, 282 U. S. 409, 424) but as pointed out above, appellee's obstacle is that no part of these funds was paid to or exacted or received by appellant.

Application for Rehearing

> As this court expressed the view in the original Reeves Bros. case that Sec. 609 constituted no defense to the collector, and both the Supreme Court and the Sixth Circuit have said that the application of the overpayments of subsequent years to the barred tax of 1917, amounted to the payment thereof, and as the facts in both cases at bar are similar, judgment will be entered in each in favor of the plaintiff."

The Reeves Bros. decision of our own Court of Appeals referred to by Judge West was rendered June 29, 1932, one month later than the decision in Parks & Woolson Mach. Co. vs. U. S., which is in 58 Fed. 2d 868. The Parks case rests solely upon the authority of U. S. Refractories Corp. vs. Commissioner of Internal Revenue, 23 B. T. A. 872. H. C. Clark was of counsel for the United States Government in both the Reeves Bros. and Parks cases and in a very detailed brief presented his argument, based on U. S. Refractories Corp. vs. Commissioner of Internal Revenue, supra, to our Court of Appeals. Our Court of Appeals had before it the very argument made by government counsel in the Parks case and yet it arrived at the conclusion quoted by Judge West.

In the original opinion of Judge West in the Reeves Bros. case, to be found in C. C. H. Vol. 3—1931—Sec. 9022, reliance is placed partly on Graham & Foster vs. Goodcell, 282 U. S. 409, and also on a construction of the word "void" which is used in Sec. 609 of the Revenue Act of 1928,

> "To construe the word 'void' as defendant suggests, would convert what Congress intended as a shield for the taxpayer into a sword for the government.
>
> " 'It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed.' Weeks v. Bridgman, 159 U. S. 541, 547."

As supporting this same construction see United States vs. Steamship Co., 239 U. S. 88, from which we also quote:

"Even when a statute in so many words declares a tranaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice."

The Federal Courts have denied the taxpayer relief in cases where a refund claim has not been filed **because the government has argued**, as we do here, that the word "void" does not mean "of no effect whatsoever," and in view of the repeal of Sec. 1106 (a) of the Revenue Act of 1926 and Sec. 3226 R. S. as amended in 1926, it may well be doubted if the theory of a common law action in Bonwit Teller & Co. vs. United States, 283 U. S. 258, is sound in the case of an admittedly erroneous or illegal tax collected by the United States unless a refund claim is filed as a condition precedent to suit. See Harvey vs. Mallay, 52 Fed. 885. The position of the government in this case is not only contrary to law as laid down in reported cases but is contrary to the very procedure approved by the Commissioner of Internal Revenue as shown by regulations promulgated with every revenue law since 1918.

It is no wonder then that our Court of Appeals tacitly approved Judge West's interpretation of the word "void" and also called the credit in a case of this kind in fact a "payment."

We respectfully submit that the rehearing should be granted and judgment rendered in accordance with the decisions of our Court of Appeals and of Judge West.

Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ENTRY—Filed October 22, 1934.

This cause came on to be heard before the Court on the pleadings and an agreed statement of facts after a jury had been waived.

At the request of both parties, the Court makes a special finding of facts as follows:

1. Lowe Brothers Company is a corporation duly organized and existing under the laws of the State of Ohio, having its principal place of business in the City of Dayton, State of Ohio, and was incorporated in June, 1929.

2. Lowe Brothers Company (incorporated in 1893), predecessor of the petitioner, filed its income and profits tax return for its fiscal year ended September 30, 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown due thereon; the predecessor of petitioner filed its income and excess profits return for the fiscal year ended September 30, 1918, on October 31, 1918, with the proper Collector of Internal Revenue and paid the tax shown due thereon.

3. On March 15, 1924, the Commissioner of Internal Revenue only assessed against Lowe Brothers Company (incorporated in 1893) an additional income and profits tax for the fiscal year 1917 amounting to $31,771.71.

4. On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of over-assessments indicating that the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instruction from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the said credit on April 24, 1924, and the Commissioner approved said credit on May 10, 1924.

5. On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000.00 for its fiscal year ended September 30, 1917. On February 1, 1929, the Commissioner of Internal Revenue gave formal notice of the rejection of said claim.

6. On January 25, 1923, and on February 9, 1923, respectively, the petitioner's predecessor filed income and profits tax waivers, approved by the Commissioner of Internal Revenue, for the fiscal year ended September 30, 1917. These income and profits tax waivers expired on April 1, 1924.

Entry

and concluded the law on such facts to be as follows:

1. The application of the payment of the sum of $11,230.14 in suit arising from overpayment of tax for the year 1918 to the barred tax for the year 1917 is void and consequently the same does not constitute an overpayment of tax for the said year 1917 under the provisions of Section 607 of the Revenue Act of 1928 by reason of the restrictive features of Section 609 of said act.

2. Plaintiff's motion to declare the law to be that the application of the credit to the 1917 tax constituted a payment of said 1917 tax, is denied.

3. Plaintiff's motion for judgment is denied and defendant's motion for judgment in its behalf, made at the close of all the testimony, is well taken and it should be sustained.

The premises considered, it is hereby Ordered on the basis of the foregoing facts found (which were stipulated by the parties) and on the basis of the foregoing conclusions of law, that the plaintiff's petition be and the same is hereby dismissed with plaintiff's costs and that plaintiff's motion for a new trial be and the same is hereby denied, to all of which the plaintiff duly excepts, and it is further Ordered that the plaintiff's application for rehearing be and the same is hereby denied at the plaintiff's cost.

To the Court's conclusions of law and to the orders herein made the plaintiff excepts on the ground that the Court's conclusions of law are erroneous and on the ground that judgment should have been entered for the plaintiff on the basis of the facts stipulated and found.

Enter:

(Signed) Nevin,
Judge.

Approved as to form only:
John E. Hughes,
Counsel for Plaintiff.
Frederic W. Johnson, Ass't U. S. Atty.,
Counsel for Defendant.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935.

To the Hon. Robert R. Nevin, District Judge:

The above named Lowe Brothers Company, feeling aggrieved by the final judgment rendered and entered in the above entitled cause on the 22nd day of October, 1934, does hereby appeal from said final judgment to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in the assignment of errors filed herewith and attached hereto, and prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of record, proceedings and documents, on which said final judgment was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Sixth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that an order relating to the security to be required of it be made.

John E. Hughes,
Wm. Cogger,
Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ASSIGNMENT OF ERRORS—Filed Jan. 17, 1935.

Comes now the plaintiff, Lowe Brothers Company, a corporation, and for its assignment of errors says that the Court erred as follows:

1. The Court erred in holding that the credit of $11,230.14 to the deficiency for the fiscal year ended September 30, 1917, did not constitute a payment of $11,230.14 on said deficiency.

2. The Court erred in failing to hold that plaintiff's cause of action arose on the enactment of Sections 607 and 609 of the Revenue Act of 1928.

Assignment of Errors

3. The Court erred in holding that the credit of the over payment of tax for 1918 to the deficiency for 1917 was wholly void and erred in its construction of the word "void."

4. The Court erred in failing to render judgment to the plaintiff and in rendering judgment for the defendant.

5. The Court erred in holding that the findings of fact were sufficient to sustain the judgment for the defendant.

6. The Court erred in not rendering judgment for the plaintiff on the findings of fact.

(Signed) John E. Hughes,
(Signed) William Cogger,
(Signed) Dolle, O'Donnell & Cash,
Attorneys for Plaintiff.

ORDER ALLOWING APPEAL—Filed Jan. 18, 1935.

On motion of Dolle, O'Donnell & Cash, et al., solicitors and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final judgment heretofore entered herein be and the same is hereby allowed, and that a certified transcript of the record, exhibits, stipulations and all proceedings be forthwith submitted to said United States Circuit Court of Appeals for the Sixth Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250.00.

Dated the 18th day of January, 1935.

(Signed) Nevin, J.

BOND ON APPEAL—Filed Jan. 18, 1935.

Know All Men By These Presents:

That we, Lowe Brothers Company, as principal, and Royal Indemnity Company, as surety, are held and firmly bound to The United States of America in the sum of Two Hundred Fifty ($250.00) Dollars, lawful money of the United States, to be paid to them and their successors, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and all of our successors and assigns by these presents.

Sealed with our seals and dated this day of January, 1935.

Whereas, the above named Lowe Brothers Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the judgment of the District Court for the Southern District of Ohio, Western Division in the above entitled cause:

Now, Therefore, the condition of this obligation is such that if the above named Lowe Brothers Company shall fail in its said appeal to effect and answer all costs, if it failed to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

Lowe Brothers Company,
By James B. O'Donnell,
Attorney in fact.
Royal Indemnity Company,
By W. A. Earls,
Attorney in Fact.

(Seal)

State of Ohio }
Hamilton County } ss.

On the 16th day of January, 1935, personally appeared before me Lowe Brothers Company by James B. O'Donnell, its attorney in fact, and Royal Indemnity Company by W. E. Earls, its attorney in fact; respectively known to me to be the persons and parties described in and who duly executed the foregoing instrument as parties thereto, and respectively acknowledged as for itself and himself that they executed the same as their free act and deed for the purposes therein set forth.

And said Lowe Brothers Company, by James B. O'Donnell, its attorney in fact, and Royal Indemnity Company by W. E. Earls, its attorney in fact, being respectively by me duly sworn, says each for itself and

himself that each company respectively is authorized to do business in the State of Ohio and in the Southern District of Ohio, Western Division, and that each company is worth the sum of $250.00 and over and above its just debts and legal liability and property exempt from execution.

Lowe Brothers Company,
By James B. O'Donnell,
Attorney in Fact.
Royal Indemnity Company,
By W. A. Earls,
Attorney in Fact.

Sworn to and subscribed before me this day of January, 1935.

John R. Hahn,
Notary Public, Hamilton County, Ohio.

No objections.
Frederic W. Johnson,
Ass't U. S. Atty.

The within bond is approved both as to sufficiency and form this 18th day of January, 1935.

(Signed) Nevin, J.

CITATION ON APPEAL—Filed Jan. 18, 1935.

To the United States of America Through Its District Attorney for the Southern District of Ohio, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Sixth Circuit to be held at Cincinnati, Ohio, on the 16 day of February, 1935, pursuant to an order allow-

ing an appeal filed and entered in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, from a final judgment signed, filed and entered on the 22nd day of October, 1934, in that certain suit, being in law No. 4290, wherein Lowe Brothers Company is plaintiff and The United States of America, is defendant and appellee, to show cause, if any there be, why the final judgment rendered against the said plaintiff appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Robert R. Nevin, United States District Court Judge for the Southern District of Ohio, Western Division, this 18th day of January, 1935, and of the Independence of the United States the One Hundred Fifty-ninth.

(Signed) Nevin,
United States District Court Judge
for the Southern District of Ohio,
Western Division.

Service of the above citation is hereby acknowledged and the appearance of the appellee, The United States of America, is hereby entered.

Frederic W. Johnson,
Asst. U. S. Atty.

PRAECIPE FOR RECORD AND PROCEEDINGS

—Filed Jan. 18, 1935.

To the Clerk:

Please prepare a transcript of the papers, stipulations and proceedings for appeal to the U. S. Circuit Court of Appeals:

1. Petition.
2. Affidavit of Service.
3. Answer.
4. Reply.
5. Waiver of Jury.
6. Stipulation of Facts and Attached Exhibits.
7. Request for Separate Findings and Conclusions of Law.
8. Motion for Judgment.
9. Decision of the Court.
10. Application for Rehearing.
11. Judgment Entry.
12. Petition for Appeal.
13. Assignment of Errors.
14. Order allowing Appeal.
15. Bond on Appeal.
16. Citation and Waiver of Service and Appearance.
17. Praecipe.

Dolle, O'Donnell & Cash,
Attorneys for Ptf.

O. K.
F. W. Johnson,
Ass't U. S. Atty.

CLERK'S CERTIFICATE.

United States of America }
Southern District of Ohio } ss.

I, Harry F. Rabe, Clerk of the United States District Court in and for the Southern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original papers, exhibits, and proceedings in the matter of Lowe Brothers Company v. The United States of America, at Law 4290, as is indicated in the Praecipe for Record and Proceedings on Appeal, filed on January 18th, 1935, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cincinnati, Ohio this 16th day of February, A. D. 1935.

Harry F. Rabe, Clerk,
By H. E. Parker,
Deputy Clerk.

(Seal)

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(November 8, 1937—Before: SIMONS, ALLEN and DRUFFEL, JJ.)

This cause is argued by J. B. O'Donnell for Appellant and by E. E. Angevine for Appellee and is submitted to the Court.

JUDGMENT

(Filed November 11, 1937)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause dismissing the petition be and the same is hereby affirmed for lack of jurisdiction in the District Court to entertain it.

MEMORANDUM OPINION

(Filed November 11, 1937)

PER CURIAM. The appellant sought to recover a sum in excess of ten thousand dollars collected by the Commissioner of Internal Revenue in one year by way of a credit on the taxes for that year of an overpayment declared in respect to taxes for another year. The District Court sustained a motion for judgment on behalf of the appellee upon the ground that the application to the barred deficiency tax for the year 1917 of a credit in the sum of $11,239.14 arising from overpayment of tax for the year 1918 is void and consequently does not constitute an overpayment of tax for the year 1917 under the provisions of Sec. 607 of the Revenue Act of 1928, by reason of the restrictive features of Sec. 609 of such Act.

This ruling constituted error. *United States* v. *John Gallagher Co.*, 83 Fed. (2d) 368 (C. C. A. 6).

On the issue of the jurisdiction of the District Court to entertain the suit under Sec. 24 of the Judicial Code as amended (28 U. S. A., Sec. 41) the order must be affirmed.

In *United States* v. *Reeves Bros. Co.*, 83 Fed. (2d) 121, we held that the jurisdiction conferred upon District Courts to hear and determine suits against the United States for the recovery of an illegally or erroneously exacted tax in excess of $10,000, is limited to cases where the tax was collected by a Collector of Internal Revenue who is dead or out of office, and that it was as essential to the jurisdiction that the tax was collected by a collector as, where so collected, that he be dead or out of office. Here, as there, the tax was not collected by a collector, and the court has no jurisdiction. *Moses* v. *United States*, 61 Fed. (2d) 791 (C. C. A. 2).

United States v. *Piedmont Mfg. Co.*, 89 Fed. (2d) 296, is cited in opposition to this view, and we are asked to reconsider and reverse. We are unable to view the Piedmont decision as persuasive of error in the Reeves case since the collector there involved was still in office when the suit was commenced, in consequence of which the Supreme Court failed to recognize a conflict between the two decisions, as is shown by its

denial of the petition for rehearing of the denial of the writ of certiorari in *United States* v. *Reeves Bros. Co., supra* (57 Sup. Ct. 920).

The judgment below dismissing the petition is affirmed for lack of jurisdiction in the District Court to entertain it.

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ORDER DENYING PETITION FOR REHEARING

(Filed December 17, 1937)

Upon consideration of the petition for rehearing filed on behalf of the appellant in the above cause, it is ordered that the per curiam opinion heretofore filed therein be clarified by striking out the phrase "there involved" in the second last paragraph thereof and substituting the phrase "in the Reeves case," and

IT IS FURTHER ORDERED that the petition for rehearing be denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Lowe Brothers Company* v. *United States of America*, No. 7034, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 4th day of March, A. D. 1938.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.